Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations	)	CC Docket No. 01-338
of Incumbent Local Exchange Carriers	)	

REPLY COMMENTS OF US LEC CORP., TDS METROCOM, LLC, FOCAL COMMUNICATIONS CORPORATION, PAC-WEST TELECOMM, INC., GLOBALCOM, INC., LIGHTSHIP TELECOM, LLC, ONEEIGHTY COMMUNICATIONS, INC., AND CAVALIER TELEPHONE

US LEC Corp., TDS Metrocom, LLC, Focal Communications Corporation, Pac-West Telecomm, Inc., Globalcom, Inc., Lightship Telecom, LLC, OneEighty Communications, Inc., and Cavalier Telephone (collectively "Commenters"), by their attorneys and pursuant to the Public Notice dated September 26, 2003, hereby provide their reply comments in response to the Further Notice of Proposed Rulemaking ("FNPRM") regarding the Commission's rules implementing Section 252(i) of the 1996 Act, the so-called "pick-and-choose" rules.

The Comments filed in this proceeding make abundantly clear that the FCC's proposed revision to the pick-and-choose rules is poorly conceived. CLECs almost universally oppose the measure because it eliminates substantive rights without providing any appreciable benefits.[1] ILECs oppose significant portions of the proposal because they feel it does not go far enough.[2]

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[1] Comments of the Association for Local Telecommunications Services, Comments of Mpower Communications Corp., Comments of the CLEC Coalition, Comments of the Rural Independent Competitive Alliance, Comments of Z-Tel Communications, Inc., Comments of Sprint Corporation, Comments of LecStar Telecom, Inc., Joint Comments of the PACE Coalition and CompTel, Comments of WorldCom, Inc., Joint Comments of the American Farm Bureau, Inc. et al.

[2] Comments of the United States Telecom Association; Comments of Verizon, Comments of SBC Communications, Inc., BellSouth's Comments, Comments of CenturyTel, Inc., Comments of Qwest Communications International, Inc.

State commissions and consumer groups are split on the issue.[3] The impetus for the proposed revision—the Mpower Petition for Forbearance filed in May 2001—has even been withdrawn and its proponent has disavowed any connection between the Mpower petition and the Commission's proposed elimination of the pick-and-choose rules.[4] None of the comments in support of the FCC's proposal adequately demonstrate that the proposed revision is even lawful. In short, nothing in the record provides the Commission with adequate support to take the approach proposed in the FNPRM. Accordingly, the proposed revisions to the pick-and-choose rules should be abandoned and the existing rules should be retained. Commenters submit these comments to explain why arguments in favor of the Commission's proposed approach are flawed or are extremely misleading.

Reading the comments of Verizon, one could conclude the following: CLECs currently have the right to pick and choose all terms and conditions that they consider favorable, without any obligation to accept all the remaining provisions of the agreement. Verizon Comments at 2. But CLECs have "rarely used" the pick-and-choose rules to "cherry-pick" provisions. *Id.* at 3. In only 60 of 3600 cases—only 1.7% of all cases—have CLECs "cherry-picked" favorable provisions. *Id.* Further, there is no evidence of ILECs adopting "poison pill" provisions in agreements. *Id.* at 5.

While Verizon takes this string of facts to suggest that the pick-and-choose rules are not necessary, the evidence demonstrates in fact that the current pick-and-choose rules work. In 98.3% of cases in Verizon's territory, CLECs have not "cherry picked" the best parts and left the

[3] Comments of the New York State Department of Public Service, Comments of the Public Utilities Commission of Ohio, Comments of the Florida Public Service Commission (favoring FCC proposal); Comments of the People of the State of California and the California Public Utility Commission, Comments of the National Association of State Utility Consumer Advocates (opposing FCC proposal).

remaining parts alone. The current rules serve as an extremely effective deterrent by keeping Verizon or any other ILEC from inserting "poison pill" provisions into contracts that make the entire agreements unpalatable.

Verizon also makes the following string of assertions: ILECs have no incentive to "give a little" for fear that ILECs must provide "the same 'give' to every CLEC that wanted it without getting the concession in return." Verizon Comments at 2-3. Yet Verizon asserts that "innovative commercial arrangements" in any form are not subject to section 252(i) because Section 252(i) is applicable only to section 251 requirements. *Id.* at 4. BellSouth shares this view by asserting that some alternative to pick-and-choose must be established because once BellSouth is no longer required to provide the elements that comprise the UNE-Platform, "a commercially negotiated agreement that calls for the provision of that element is no more within the scope of § 252 than is a provision dealing with issues entirely unrelated to the subject matter of §§ 251 and 252." BellSouth Comments at 3, n.9.

Both Verizon and BellSouth contradict themselves. In essence, Verizon and BellSouth assert that the terms and conditions subject to section 252(i) are only those requirements imposed by the Telecom Act, which ILECs are already compelled to provide to all CLECs. They believe that any "give" by Verizon or BellSouth beyond the terms of the Telecom Act is not subject to adoption under 252(i). Thus, in Verizon's and BellSouth's view, they already have statutory protection from sharing the "give" it offers to other CLECs, and any revision to the pick and choose rules would not alter that fact.

Commenters disagree with the premise of this ILEC argument—section 252(i) requires that *any* terms and conditions of interconnection in agreements approved under section 252 must

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[4] Comments of Mpower Communications Corp. at 2 ("It must be emphasized that Mpower's May 25, 2001 Petition never sought, nor requested, that the Commission eliminate or revisit the pick-and-choose rule for the

be made available to *all* other carriers—but the contradiction illustrates the fallacy of the argument underlying the proposed changes to the rules. Revision of the pick-and-choose rules is not necessary to promote more meaningful negotiations because ILECs have no incentive for more meaningful negotiations at all. If they truly believed that meaningful give-and-take was not subject to section 252(i), they would have engaged in it already. By their own admission, they haven't. Besides, interconnection agreements cover many topics apart from section 251 requirements that ILECs insist upon and no CLEC would be permitted to opt out of.

Further, Verizon's comment that "there is no reason an ILEC would want to make the [adoption] process unnecessarily cumbersome" doesn't even pass the straight-face test. Verizon itself has refused to provide interconnection without an interconnection agreement in place, and by impeding the ability to obtain an interconnection agreement in a variety of ways, Verizon stifles competition. Protecting its market share is one reason, among others, why Verizon would want to make the adoption process cumbersome.

At least Verizon and the Commenters agree that using the SGAT as a substitute for the pick-and-choose rules is a bad idea. Verizon Comments at 5-7.[5] Verizon's reason, however, is implausible on its face. Verizon asserts that "Requiring an SGAT is unnecessary because CLECs already have numerous approved interconnection agreements to choose from." *Id.* at 6. Perhaps on a nationwide basis this explanation may be true, but for every 100 agreements in New York, there may be one agreement in the District of Columbia available for adoption. Further, Verizon places whatever restrictions on adoption that it can conceive, thereby keeping a CLEC from

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separate regime of Section 252 interconnection agreements approved by state commissions[.]")

[5] Verizon and the Commenters also agree that "[t]he section 252(f) SGAT provision was included in the Act for one very narrow purpose—to be the basis for a BOC 'Track B' application under section 271(c)(1)(B) to ensure that a Bell company could apply for [in-region] interLATA authority even if no facilities-based provider had requested interconnection." Verizon Comments at n.18; *see* US LEC et al. Comments at 8-9. Now that all BOCs have, or are about to receive, Section 271 authority throughout their territories, the SGAT is obsolete.

adopting *the identical agreement* adopted by another CLEC only three months before. In the words of Samuel Taylor Coleridge, "Water, water, every where, And all the boards did shrink; Water, water, every where, Nor any drop to drink." If Verizon permitted unconditional porting of agreements between jurisdictions, its argument may have some merit, but because Verizon doesn't, it can be easily dismissed.

Verizon does, however, provide one compelling reason to reject the Commission's proposed revisions to the pick-and-choose rules: "Verizon has SGATs in only four of the smaller states in which its BOC LECs operate." Verizon Comments at 6. If the Commission were to adopt its new rules in which a CLEC must adopt an agreement in its entirety in states in which the ILEC has an approved SGAT, they would be applicable to a grand total of less than 9% of Verizon's total access lines.[6] Hardly worth the consequences when Verizon's own comments prove that the existing pick-and-choose rules are working.

SBC also finds fault in the proposed use of the SGAT. "Based on SBC's experience, no ILEC would opt to offer an SGAT, which itself would be subject to pick-and-choose, in order to obtain the limited relief from the existing pick-and-choose rule offered by the Commission's proposal." SBC Comments at 5. The reason? An SGAT may actually contain terms that were somehow *favorable* to a CLEC, and thus unacceptable to the ILEC. *Id.* Further, a CLEC may actually use the SGAT as a baseline from which to begin negotiations! SBC's comments make clear that SBC has no interest in making the interconnection agreement adoption process more efficient. Its interest is only in keeping CLECs from obtaining favorable terms. Period.

With respect to "unequal bargaining power to delay CLEC entry or extract anticompetitive concessions from CLECs," SBC asserts that the availability of state proceedings offsets "any purported bargaining power" enjoyed by ILECs. SBC Comments at 7. Likewise,

BellSouth asserts that "sufficient safeguards" against discrimination "exist within the Act." BellSouth Comments at 3. Again, it is hard to believe SBC and BellSouth expect the Commission to believe what they say. CLECs currently have, and will continue to have, rights to have state commissions intervene in disputes with ILECs. CLECs will continue to be able to have state commissions conduct arbitrations to reach terms and conditions for interconnection. The point of the pick-and-choose rules is to *avoid* state commission involvement and to make the process of establishing terms and conditions for interconnection simpler. SBC and BellSouth would have the Commission believe that an arbitration proceeding or an enforcement action is an efficient substitute for the current pick-and-choose rules. The proposal is so nonsensical that SBC and BellSouth reveal their true motive: to drive up the CLECs' costs of interconnection by compelling them to litigate every issue imaginable. There is absolutely no question that the ILECs, with their armies of attorneys, regulatory experts, and lobbyists—not to mention their decades of experience—have a tremendous advantage over most CLECs in that forum. The SBC and BellSouth proposal also gives them another advantage by delaying CLEC interconnection until the litigation is complete.

CenturyTel also supports the Commission's proposed revisions to the pick-and-choose rules. CenturyTel considers the fear of ILECs adopting "poison pill" provisions "unfounded" because ILECs already have an obligation not to discriminate against CLECs. CenturyTel Comments at 7. Yet the Commission has previously stated its view "that section 252(i) appears to be a primary tool of the 1996 Act for preventing discrimination under section 251."[7] It is illogical that pick-and-choose is a "primary tool for preventing discrimination" at the same time that pick-and-choose is not necessary to prevent discrimination. Further, as Commenters

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6 *See* ARMIS Report 43-01, 2002 data, Row 2150, Total Billable Access Lines.

7 *Local Competition Order*, ¶ 1296.

explained previously, at least one BOC has taken a dim view of its non-discrimination obligations: Qwest's preference for secret agreements is strong evidence that ILECs will discriminate when able.

Likewise, Qwest considers the concerns about ILECs insisting on "poison pill" provisions to be "overblown." Qwest Comments at 11. Again, Qwest relies on the good faith and nondiscrimination requirements of sections 201, 202 and 251(c) to restrain ILEC abuses, but this argument misses the point. Assume that Qwest is true to form as evidenced in the Minnesota Commission proceeding on Qwest's secret agreements, and Qwest demonstrates a predilection to discriminate among CLECs. The CLEC harmed by Qwest's conduct certainly may avoid the adoption process and arbitrate its own interconnection agreement with Qwest. The CLEC may also seek relief from any "poison pill" provisions by asserting a grievance at a state commission. But neither of these alternatives can be considered as efficient substitutes for the Commission's existing pick-and-choose rules. Whatever impairments exist under the current system, if any, are preferable to the impairments that will result from the Commission's proposed change.

Finally, United States Telecom Association makes the odd request for "the complete elimination of the pick-and-choose rule," yet offers no substitute to implement section 252(i). USTA Comments at 5. USTA also opposes the proposed "all-or-nothing" rule because it would "allow CLECs to continue benefiting from contractual arrangements that they are not privy to[.]" *Id.* Yet benefiting from contractual arrangements to which CLECs are not privy (at the time of negotiation) is the clear intent of section 252(i). The Commission lacks the authority to amend or ignore section 252(i) of the Telecom Act.

The Commission also lacks the legal authority to revise the pick-and-choose rules as proposed. None of the comments show how the Commission can legally reverse its current

interpretation of section 252(i). The NPRM claims room for Commission discretion by comparing the Court's statement as to how the Commission's present interpretation was the "most readily apparent" reading with the Supreme Court's subsequent statement that the effect of the Commission's interpretation on negotiations "is a matter eminently with the expertise of the Commission and eminently beyond our ken."[8]

This part of the FNPRM applies a mistaken interpretation of the Supreme Court's *Chevron* decision. The first statement by the Court addressed the Commission's interpretation of the language of section 252(i), and placed it firmly within the first prong of *Chevron* by finding the statutory language unambiguous. The second statement by the Court declined to take up the ILECs' policy argument based on the Court's lack of policy expertise, and rhetorically underscored that lack of expertise by comparing it with the Commission's. This most definitely was not a ruling that the Commission's expertise somehow entitled it to defy the plain language of section 252(i). This passage was solely a rejection of a policy argument at the very threshold, and does not and cannot mean that, had the Court decided to hear the ILECs' policy claim, the Court would have concluded the Commission somehow had the power to defy the "most readily apparent" meaning of the statutory language.

Finally, even if the language of section 252(i) did permit any discretion, the Commission would bear a heavy burden under *Motor Vehicles Mfg. Assn. v. State Farm*, 463 U.S. 29 (1983) of justifying so extreme a reversal in a statutory interpretation. None of the comments demonstrate how that heavy burden has been met.

The Commission should abandon its proposal to revise the "pick-and-choose" rules implementing section 252(i) of the Telecom Act. None of the Comments filed in this proceeding provides an adequate basis for the Commission to change its current rules.

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[8] FNPRM ¶ 721.

Respectfully submitted,

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Richard M. Rindler
Michael W. Fleming
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007
(202) 424-7500

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Counsel for US LEC Corp., TDS Metrocom, LLC, Focal Communications Corporation, Pac-West Telecomm, Inc., Globalcom, Inc., Lightship Telecom, LLC, OneEighty Communications, Inc., and Cavalier Telephone